

MEMORANDUM TO: David M. Spooner  
Assistant Secretary  
for Import Administration

FROM: Stephen J. Claeys  
Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum for the 2003-2004 Antidumping  
Duty Administrative Review: Certain Cased Pencils from the  
People's Republic of China

### **Summary**

China First Pencil Co., Ltd. ("CFP")/Three Star Stationery Industry Corp. ("Three Star") (jointly, "CFP/Three Star"), Orient International Holding Shanghai Foreign Trade Co., Ltd. ("SFTC"), and Shandong Rongxin Import & Export Co. Ltd. ("Rongxin"), respondents, and Sanford LP, Musgrave Pencil Company, RoseMoon, Inc., and General Pencil Company, domestic interested parties ("domestic parties") submitted comments and rebuttal comments on the preliminary results of this administrative review covering certain cased pencils from the People's Republic of China ("PRC"). We have analyzed these comments and recommend that you approve the positions we have developed in the **Department's Position** sections of this memorandum.

### **Background**

On December 28, 2005, the Department of Commerce ("the Department") published the preliminary results of this review.<sup>1</sup> The period of review ("POR") is December 1, 2003, through November 30, 2004. On February 24, 2006, we received case briefs from CFP/Three Star, SFTC, Rongxin, and the domestic parties. We received rebuttal briefs from CFP/Three Star, SFTC, Rongxin, and the domestic parties on March 1, 2006.

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<sup>1</sup> See *Certain Cased Pencils from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 70 FR 76755 (December 28, 2005) ("Preliminary Results").

### List of Comments in the Issues and Decision Memorandum

- Comment 1: Whether the Department properly valued pencil cores.
- Comment 2: Whether the Department should use one or more respondents' market-economy purchase prices of cores, erasers and lacquer to value these factors for respondents that did not purchase these items from a market-economy supplier.
- Comment 3: Whether the Department excluded small quantity/high value import transactions from its calculation of surrogate values.
- Comment 4: Whether the Department used the wrong Harmonized Tariff Schedule ("HTS") category to calculate a surrogate value for Rongxin's kaolin clay.
- Comment 5: Whether the Department should continue to apply partial adverse facts available to SFTC.
- Comment 6: Whether the surrogate value for labor is correct.
- Comment 7: Whether to continue to treat CFP and Three Star as a single entity.
- Comment 8: Whether the Department properly accounted for wood loss in its calculation of a surrogate value for slats.
- Comment 9: Whether the Department used the correct lumber dimensions to calculate a surrogate value for slats.
- Comment 10: Whether to continue to apply total adverse facts available to Guangdong Stationery & Sporting Goods Import & Export Corp.

### COMMENT 1: Whether the surrogate value for pencil cores is aberrational

CFP/Three Star and SFTC claim that the surrogate value for pencil cores used in the *Preliminary Results*, which was based on Indonesian import statistics (Indonesian WTA data), is aberrational. CFP/Three Star and SFTC argue that it is the Department's practice to exclude aberrant surrogate values from the calculation of normal value, that the Department's overarching mandate is to use the "best available"<sup>2</sup> information, and that the Department prefers to use surrogate values from a single surrogate country. Citing multiple past cases, the respondents argue that the Department examines surrogate values for reasonableness and does not include aberrant surrogate values in the calculation of normal value.<sup>3</sup>

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<sup>2</sup> See *Shakeproof Assembly Components, Inc. v. United States*, 268 F.3d 1376 (Fed. Cir. 2001). See also *Olympia Indus., Inc. v. United States*, 7 F. Supp. 2d 997, 1000-01 (CIT 1998) ("accuracy is the touchstone of the antidumping statute"), *Shandong Huarong General Corp. v. United States*, 159 F. Supp. 2d 714, 719-720, (CIT 2001), and *Shanghai Foreign Trade Enterprises Co., Ltd., et al. v. United States*, 28 CIT \_\_\_, Slip Op. 04-33 (April 9, 2004).

<sup>3</sup> See, e.g., *Refined Antimony Trioxide from the People's Republic of China, Final Determination of Sales at Less Than Fair Value*, 57 FR 6801,6803 (February 28, 1992) (where the Department stated it will reject surrogate financial ratios if there is record evidence showing that they are aberrant by industry standards). See also *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From Romania: Final Results of Antidumping Duty Administrative Review*, 62 FR 37194, 37199 (July 11, 1997); *Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From Belarus*, 66 FR 33528 (June 22, 2001), and accompanying Issues

CFP/Three Star and SFTC base their claim that the Indonesian WTA data are aberrational on a determination that the Indonesian WTA data are significantly higher than surrogate values derived from other data on the record of this review, which include Indian import statistics from the Internet website “<http://eximkey.com>” (the Eximkey data) or from the Indian government Internet website “<http://infodriveindia.com>” (the Infodrive data), Indian domestic prices, Indian export prices, and a Mexican price quote. First, they point to a range of values from these sources of \$0.87 to \$3.48 per kilogram and compare that to the \$7.76 per kilogram value used in the *Preliminary Results*. Specifically, CFP/Three Star and SFTC point to a declaration from a U.S. pencil producer<sup>4</sup> regarding prices based on his commercial experience, a price quote from a Mexican producer, Three Star’s market economy purchase prices and the Eximkey data. Second, these respondents assert that record evidence clearly demonstrates that color cores are more costly than black cores, that the Indonesian import statistics used in the *Preliminary Results* are tainted by the inclusion of color cores, and that Three Star’s actual market-economy purchase price (on the record of this review) of color cores is within the range of pencil core values derived from the non-Indonesian sources mentioned above.

CFP/Three Star and SFTC also argue that the Eximkey data provide the Department with the best available data for valuing cores, and assert that the Department reached this same conclusion when it used the Eximkey data in the 2000 - 2001 segment of this proceeding for this very purpose. Moreover, CFP/Three Star and SFTC claim that non-pencil core items that may be included in Indian and Indonesian WTA import statistics can be excluded from the Eximkey data using the narrative description contained in this database. Along this same line, these respondents posit that the Eximkey data show that it is not unusual for articles other than pencil cores to be included in the Indian WTA data and suggest that this is most likely true of Indonesian WTA data as well. CFP/Three Star and SFTC conclude, based on the arguments above, that the record clearly demonstrates the aberrant nature of the Indonesian WTA data, and urge the Department to turn to one of the alternative Indian surrogate value sources on the record, preferably the Indian Eximkey data.

CFP/Three Star and SFTC argue that using the Eximkey data would comport with the Department’s preference for surrogate value data from a single surrogate country. They argue that since “nearly contemporaneous”<sup>5</sup> data from India are on the record, there is no need for the

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and Decision Memorandum at Comment 2; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People’s Republic of China*, 59 FR 55625, 55633 (November 8, 1994) (stating “although we have selected India as the appropriate surrogate country in this investigation, this does not mean that we are required to use those Indian values that we find to be aberrational. . .”); *Notice of Final Determination of Sales at Less Than Fair Value; Honey From the People’s Republic of China*, 66 FR 50608 (October 4, 2001), and accompanying Issues and Decision Memorandum at Comment 3; and *Notice of Final Determination of Sales at Less Than Fair Value; Certain cut-to-Length Carbon Steel Plate From the People’s Republic of China*, 62 FR 61964 (November 20, 1997) at Comment 29.

<sup>4</sup> See Respondents’ February 1, 2005, surrogate value submission at Exhibit 5.

<sup>5</sup> See Respondents’ February 24, 2006 case brief at page 9.

Department to stray from the primary surrogate country for any surrogate values in this review. CFP/Three Star and SFTC assert that although some of the Eximkey import data quantities are reported in terms of “boxes” the Department can use the conversion used in the 2000 - 2001 POR to convert boxes to gross or pieces. While they acknowledge that this conversion is not stated in current Eximkey data, they argue the conversion is still valid because when applied to Eximkey data covering the subsequent PORs, the calculated unit values are comparable to those calculated in the 2000 - 2001 POR.

Alternatively, CFP/Three Star and SFTC suggest calculating a surrogate value for pencil cores using one – or a combination – of the other Indian sources mentioned above. As a final alternative, CFP/Three Star and SFTC suggest that the Department use the market-economy purchase price of one respondent as a surrogate value for all respondents in line with their arguments regarding valuation of erasers and lacquer. *See* comment 2, below. CFP/Three Star and SFTC state that the Department has done this in other antidumping duty proceedings.<sup>6</sup> CFP/Three Star and SFTC argue that, in this case, should the Department decide to use Three Star’s market-economy purchase price of cores, it should use that value for both black and color cores for all respondents.

The domestic parties rebut the respondents’ arguments stating that “. . . it is not the nationwide Indonesian import statistics, covering an extensive number of transactions and supplier countries that are aberrational. Rather it is the self-selected, self-interested private data and the fragmentary Eximkey and Infodrive data that provide aberrationally low values.”<sup>7</sup> Furthermore, the domestic parties argue that the published Indonesian import data used in the *Preliminary Results* meet the Department’s criteria for surrogate value selection because they cover a multitude of transactions over the entire surrogate market-economy country and the entire POR. Moreover, the domestic parties argue that the Department’s use of import data to value pencil cores has been approved by the United States Court of International Trade (“CIT”)<sup>8</sup> and respondents have provided no new arguments as to why the Department should change its methodology used to value pencil cores.

The domestic parties address each of these items in turn. First, the domestic parties argue that the Indian core supplier’s domestic and export price quotes on the record of this review do not reflect any actual sales and/or general price levels in a surrogate market economy. Citing prior

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<sup>6</sup> *See Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People’s Republic of China*, 61 FR 19026, 19029-30 (April 31, 1996) (*Bicycles*), and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate from the People’s Republic of China*, 65 FR 19873 (April 13, 2000) (*Apple Juice*).

<sup>7</sup> *See* domestic parties’ rebuttal brief at page 8.

<sup>8</sup> *See Kaiyuan Group Corp. v. United States*, 343 F. Supp. 2d 1289, 1313 (CIT 2004) (“*Kaiyuan v. United States*”).

segments of this proceeding,<sup>9</sup> the domestic parties allege that the Department rejected price quotes in prior reviews on these same grounds. Domestic parties go on to argue that rejection of these price quotes is consistent with the Department's established preference for publicly available, nationwide data such as government import statistics.<sup>10</sup> They further assert that the Department will use price quotes as surrogate values only when it has concluded that the flaws inherent in using such quotes are outweighed by the fact that no other appropriate data are available – a circumstance which is not met in this review.<sup>11</sup>

Moreover, the domestic parties argue that the Department does not use price data that have little or no supporting documentation, or which are self-selected by its proponents.<sup>12</sup> The domestic parties contend that the Indian price material does not have supporting data demonstrating any actual sales were made under its terms, while the Dixon statement provides no objective support for its assertions and the purported Mexican price quote was never produced but only described second-hand. Thus, they conclude that private price quotes and price lists should not be used in this case because there are published, publicly-available import data on the record of this review. Second, the domestic parties argue that the Department cannot use Eximkey data to calculate surrogate values because they provide just partial coverage of India's imports. They assert that the Department previously rejected the use of Infodrive data, which provided data for eight Indian ports and covered at most 60 percent of total Indian imports.<sup>13</sup> The domestic parties argue

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<sup>9</sup> See *Certain Cased Pencils From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 29266 (May 21, 2004) ("Pencils 01-02") and *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 42301 (July 22, 2005) ("Pencils 02-03").

<sup>10</sup> See *Potassium Permanganate From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 66 FR 46775 (September 7, 2001) ("Potassium Permanganate"), citing *Manganese Metal from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 63 FR 12440, 12442 (March 13, 1998) ("Manganese Metal"); *Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese From Kazakhstan*, 67 FR 15535 (April 2, 2002); and *Notice of Final Determination of Sales at Less Than Fair Value; Honey From the People's Republic of China*, 66 FR 50608 (October 4, 2001).

<sup>11</sup> See *Final Determination of Sales at Less Than Fair Value; Saccharin from the People's Republic of China*, 68 FR 27530 (May 20, 2003) (*Saccharin*), and the accompanying Issues and Decision Memorandum at pages 4 and 5.

<sup>12</sup> See *Final Determination of Sales at Less Than Fair Value; Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 FR 34125 (June 18, 2004) ("Retail Carrier Bags") and the accompanying Issues and Decision Memorandum at page 48, *Saccharin* and the accompanying Issues and Decisions Memorandum at page 5, *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 48612 (July 25, 2002) and the accompanying Issues and Decision Memorandum at page 13 (rejecting use of price quotes that "were placed on the record by a party affiliated with a U.S. importer of the subject merchandise"), and *Kaiyuan v. United States*.

<sup>13</sup> See *Final Determination of Sales at Less Than Fair Value; Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 67313 (Nov. 17, 2004) (*Furniture*), and the accompanying Issues and Decision Memorandum at Comment 10.

that the Eximkey data would necessarily reflect less than 60 percent because they cover two fewer ports than Infodrive. Furthermore, the domestic parties claim that after excluding import data covering pencil cores of dimensions not used in the production of subject merchandise and transactions of indeterminate quantities (those reported in terms of boxes rather than pieces or gross), there remain data covering only 1,247 gross of pencil cores imported by two parties in two months of the POR. The domestic parties argue that, in accordance with Department practice and policy, the remaining data are too limited for use as surrogate values.<sup>14</sup> Moreover, they take issue with respondents' suggestion that the quantity of imported pencil cores reported in terms of boxes were imported by G.M. pens, as in the prior year, and with the idea that the boxes could be converted to pieces or gross using the conversion used for the 2000 - 2001 POR. The domestic parties argue the shipments made in that POR were described as air shipments, whereas shipments made in subsequent PORs entered via a seaport; thus it is likely the packing configuration/quantities would be different. Furthermore, the domestic parties claim that the import transactions reported in terms of boxes do not indicate the importer's name, thus respondents have assumed the box-to-pieces conversion is the same for all importers. The domestic parties assert that this assumption is not supported by the record.

Third, with respect to Infodrive data, the domestic parties argue that these data also are not appropriate as a surrogate value source or as bases for making determinations with respect to aberrational values. The domestic parties argue that the original Infodrive data were not submitted and thus cannot be corroborated and that quantities are not adequately defined. Moreover, the domestic parties argue that the Infodrive data represent at most 60 percent of imports into India, and that after unusable transactions are excluded, the data are at best sporadic in terms of number of parties, quantities, and time period. In addition, the domestic parties claim that many of the Infodrive transactions respondents suggest be used to calculate a surrogate value for pencil cores do not cover pencil cores used to produce subject merchandise, such as cores 60 or 75 mm in length (a standard pencil core used to produce subject merchandise is 184 mm in length) or do not even cover cores at all (*e.g.*, plastic moulded components for writing instruments (pencil leads) and black lead pencil).

### **Department's Position:**

We determine that the data on the record that best meet the Department's criteria for use as surrogate values are the Indonesian WTA data used in the *Preliminary Results*. In determining the most appropriate surrogate values the Department's practice is "to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data."<sup>15</sup> The Department undertakes this analysis on a case-by-case basis, carefully considering the available evidence in light of the particular facts of each industry.

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<sup>14</sup> See *Pencils 01-02 Issues and Decision Memorandum* at page 4, *Furniture Issues and Decision Memorandum* at page 139, *Potassium Permanganate and Manganese Metal*.

<sup>15</sup> See Policy Bulletin 04.1.

Further, the Department has reiterated its preference for publicly available information in recent cases.<sup>16</sup> Moreover, the Court has upheld Commerce's preference for publicly available information.<sup>17</sup>

CFP/Three Star and SFTC have not established that the surrogate value calculated for pencil cores using Indonesian import statistics is aberrational. They argue that the surrogate value for pencils cores using Indonesian import statistics is aberrational because it is significantly higher than surrogate values on the record of this review derived from Eximkey data covering Indian imports during 2001, 2002, and 2003, and/or from the Infodrive data covering Indian imports from December 2002 - November 2003, Indian domestic prices, Indian export prices, and a Mexican price quote. However, the Department has determined that it is not appropriate to use the Indian domestic prices, the Indian export prices, the Mexican price quote, the Eximkey data, the Infodrive data, or the market economy purchase prices submitted by CFP/Three Star and SFTC to derive surrogate values for the respondents' pencil cores. We further find it is not appropriate to use these data as benchmarks to determine whether a surrogate value is aberrational. CFP/Three Star and SFTC placed this identical data on the record of the previous segment of this proceeding. The Department specifically rejected the use of these same data to derive/calculate surrogate values in that segment of the proceeding due to deficiencies specific to each of the data sources.<sup>18</sup>

First, we find that the Indian domestic prices, the Indian export prices, and the Mexican price quote that the respondents have placed on the record are not appropriate sources for the surrogate values used to value pencil cores in the final results because these sources appear to have been obtained from the Indian and Mexican companies in direct response to a request for such prices. We find that these prices do not meet the criteria of public availability upon which the Department has historically relied when choosing appropriate surrogate values in order to lessen the possibility of manipulation of the values based on documents prepared specifically for use in trade remedy cases. *See Garlic 9<sup>th</sup> AR* Issues and Decision Memorandum at Comment 11. Moreover, the Indian domestic and export prices were obtained directly from the Indian company

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<sup>16</sup> *See Retail Carrier Bags* Issues and Decision Memorandum at Comment 9; *Notice of Final Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China*, 69 FR 34130 (June 18, 2004) ("*Tetrahydrofurfuryl Alcohol*"), and accompanying Issues and Decision Memorandum at Comment 6; *Notice of Final Results of First Administrative Review: Honey from the People's Republic of China*, 69 FR 25060 (May 5, 2004) ("*First Administrative Review of Honey*"), and accompanying Issues and Decision Memorandum at Comment 3; *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 34082 (June 13, 2005) ("*Garlic 9<sup>th</sup> AR*"), and accompanying Issues and Decision Memorandum at Comment 11; and *Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews*, 71 FR 26326 (May 4, 2006) ("*Garlic 10<sup>th</sup> AR*"), and accompanying Issues and Decision Memorandum at Comments 8 and 9.

<sup>17</sup> *See Coalition for the Preservation of Am. Brake Deum and Rotor Aftermarket Mfr. v. United States.*, 44 F. Supp. 2d 229, 259 (CIT 1999) ("Commerce's practice is to use publically available values . . .")

<sup>18</sup> *See Pencils 02/03* Issues and Decision Memorandum at Comment 2.

at the request of respondents' counsel. Furthermore, no information with respect to whether an affiliation existed between the respondents and the Indian and/or Mexican company was ever placed on the record. Without access to all of the information on how the data were obtained (including the sources and any adjustments that may have been made), it is impossible to confirm that the data are complete and/or accurate. Such previously non-public information is also of unknowable validity unless verification is conducted. As a general policy, the Department must be cautious in using selective price quotes.<sup>19</sup> A party could, for example, receive 10 quotes, and provide the Department with only the two or three it prefers. A party could also potentially influence the quote it receives from a company. There are many unknowns that accompany a price quote, so the Department does not favor the use of such information if other publicly available data are on the record. Consequently, we are also unable to address the respondents' claim that Three Star's actual market-economy purchase price of color cores is within the range of pencil core values derived from the non-Indonesian sources mentioned above, given that these sources are unreliable. Thus, we are continuing to value black and color cores using Indonesian import statistics because there is no usable information on the record of this segment of the proceeding that allows us to calculate separate surrogate values for black and color cores.

Similarly, in *Synthetic Indigo*, the Department found that the use of a value derived from the Indian import statistics for imports of polyethylene sacks and bags was preferable to the use of a value based on price quotes of Indian suppliers of plastic bags. We found in that review that, consistent with our past practice, the Indian import statistics constituted the best available information on the record because they were contemporaneous with the POR, representative of a range of prices during the POR, and sufficiently specific to the input being valued. The Department acknowledged that the import category was not as product-specific as the price quotes for plastic bags. We concluded in *Synthetic Indigo*, however, that we were not able to determine that the quotes, which were dated anywhere from seven to ten months after the end of the POR, were representative of the range of prices for the input during the POR.

By their nature, import statistics have an element of general applicability to them. Therefore, as a surrogate value they may not necessarily reflect the exact core experience of any one respondent. However, in light of the reasoning in *Synthetic Indigo* and *Garlic 9<sup>th</sup> AR*, and the factual considerations of the current review, we find that the Indonesian import statistics constitute the best available information because these data are publicly available, representative of a range of prices net of taxes and import duties, and sufficiently specific to the product.

Second, we find that the Eximkey data and the Infodrive data that the respondents have placed on the record are not appropriate sources for the surrogate values used to value pencil cores in the final results because they are not representative of the range of POR prices. As we noted in *Furniture*, the Infodrive data are not representative of the range of POR prices because they

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<sup>19</sup> See *Synthetic Indigo from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 53711 (September 12, 2003) ("*Synthetic Indigo*"), and accompanying Issues and Decision Memorandum at Comment 11.



represent, at most, 60 percent of the imports into India.<sup>20</sup> The Eximkey data cover even less import data because they are obtained from two fewer ports than are the Infodrive data.<sup>21</sup> Thus, we are unable to ascertain whether the data in these two databases are representative of the range of prices of cores throughout the POR.

Given the facts on the record, we find it appropriate to follow our practice of using import statistics when we consider that they represent the best available data. Accordingly, we have made no changes to our valuation of cores and have used the Indonesian import statistics as the basis of this valuation.

**COMMENT 2: Whether the Department should use one or more respondents' market-economy purchase prices of cores, erasers and lacquer to value these factors for respondents that did not purchase these items from a market-economy supplier**

CFP/Three Star and SFTC assert that the Indonesian import statistics used to value their erasers sourced from non-market-economy suppliers are aberrational because they are significantly higher than Three Star's<sup>22</sup> actual market-economy purchase prices for erasers during the POR. They argue that there are no other alternative sources of data on the record for this input and that, therefore, the Department should use Three Star's market-economy purchase price as the surrogate value for all other respondents for this input sourced from non-market-economy suppliers.<sup>23</sup>

Similarly, these three respondents argue that the Indian import statistics used to value lacquer inputs sourced from non-market-economy suppliers are aberrational in comparison to both CFP and Three Star's market-economy purchase prices of lacquer. They argue that there are no other alternative sources of data on the record for this input and that, therefore, the Department should use either CFP or Three Star's market-economy purchase prices (or an average of the two) as the surrogate value for all other respondents for this input sourced from non-market-economy suppliers.

Consistent with the above two arguments, CFP/Three Star and SFTC contend that the Indonesian

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<sup>20</sup> See *Furniture* Issues and Decision Memorandum at Comment 10 (“... not only are large amounts of data unusable for surrogate value purposes but the data that are usable are limited to a few customers . . . .”)

<sup>21</sup> See CFP/Three Star and SFTC's October 18, 2004, surrogate value submission at exhibit 4.

<sup>22</sup> The Department continues to treat CFP/Three Star as a single entity (see Comment 7, below). However, CFP and Three Star filed separate responses and separately reported market-economy purchases.

<sup>23</sup> The respondents point to several cases to demonstrate that the Department has in the past used the market-economy purchase prices to value the same input used by another producer when the latter did not have market economy purchases of that input. See *Bicycles* and *Apple Juice*.

import statistics used to value their black pencil cores sourced from non-market-economy suppliers are aberrational because they are significantly higher than the value of Three Star's market-economy purchases of this factor of production. With respect to cores, however, they also argue that the Department's selected surrogate value is higher than the other proposed surrogate value sources placed on the record. *See* Comment 1 above. They argue that if the Department does not determine to use Eximkey data to derive the surrogate value for their pencil cores,<sup>24</sup> the Department should use Three Star's market-economy purchase price as the surrogate value for all cores (black and color) sourced by each of these companies from non-market-economy suppliers.

In support of these arguments, the respondents contend that while the Department has construed 19 CFR 351.408(c)(1) to limit use of market-economy purchase values to the company incurring the market-economy purchase, the regulation does not, in fact, require such a limited application of the relevant provision. Rather, the parties contend the regulation suggests that if a factor is sourced from a market-economy supplier by any respondent, it should be applied to all parties as a "commercially realistic value" for the input in question. *See* Respondents' brief at 15.

Finally, CFP/Three Star and SFTC argue that if the Department does not agree to use the market-economy purchase prices of one respondent as a surrogate value for all other respondents, it should at least use Three Star's market-economy purchase prices of erasers and pencil cores as surrogate values for CFP because the Department determined these two companies to be affiliated and is treating them as a single entity for purposes of this review.

The domestic parties assert that the respondents' initial premise, *i.e.*, that the import statistics used to value lacquer, erasers and cores are aberrational simply based on a comparison to a few market-economy purchase prices, is flawed. They aver that the price paid to a single market-economy supplier of a particular item has no bearing on whether the aggregate import statistics covering that item are aberrational. They contend that such a premise would result in the Department having to use market-economy purchase prices for all respondents any time a single market-economy purchase price varied from the value derived using import statistics, contrary to Department practice. Finally, the domestic parties claim that whether the producers are related (such as with CFP and Three Star) is immaterial to this issue.

### **Department's Position:**

We find that the market-economy prices paid for lacquer, erasers, and pencil cores by certain respondents are not the most appropriate source of surrogate values for these FOPs for other respondents. The market-economy prices on the record of this review are proprietary and are not publicly available. Section 351.408(c)(1) of the Department's regulations specifically states that "the Secretary normally will use publicly available information to value factors." Additionally,

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<sup>24</sup> In Comment 1, these respondents proposed that the Department use Eximkey data to derive the surrogate value for pencil cores for all three respondents.

in Policy Bulletin 04.1, the Department explains that, “in assessing data and data sources, it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data” (emphasis added). Further, and also as discussed in the Department’s Position to Comment 1 above, the Department has reiterated its preference for publicly available information in several recent cases.<sup>25</sup> And as stated above, the Court has upheld Commerce’s preference for publicly available information.<sup>26</sup>

Using the market-economy purchase price of one company as a surrogate value for another company would be a significant departure from Department practice to date. First, the data suggested by these respondents are based on proprietary information submitted in their respective questionnaire responses, and, in *Apple Juice*, the Department explained that “{o}nly with respect to aseptic bags, for which we did not have reliable surrogate information,” did we use the average prices paid by other respondents to purchase the input from a market-economy supplier. Otherwise, {a}s is our practice, we valued PRC-sourced inputs using publicly available information from” the preferred surrogate country.<sup>27</sup> Second, the market-economy purchase price of one company is not representative of the range of POR prices and, thus, is not reliable as a surrogate value for other companies, nor is it reliable as a benchmark for assessing whether any particular given surrogate value is aberrational. In other cases, to test the reliability of the surrogate values alleged to be aberrational, the Department compared the selected surrogate value for each factor of production (“FOP”) to the average unit value (“AUV”) calculated for the same period using data from the other surrogate countries designated for that review.<sup>28</sup>

In support of its argument to use the market-economy purchase price(s) of one respondent as a surrogate value for another respondent, CFP/Three Star and SFTC cite *Bicycles* and *Apple Juice* in which the Department, for certain inputs, used an average of market-economy purchase prices as surrogate values for respondents that had not made market-economy purchases of these inputs. However, in *Bicycles*, these values were used “strictly as a second alternative” when no public surrogate value data were available in the surrogate countries. The Department stated in

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<sup>25</sup> See *Retail Carrier Bags* Issues and Decision Memorandum at Comment 9; *Tetrahydrofurfuryl Alcohol* Issues and Decision Memorandum at Comment 6; and *Notice of Final Results of First Administrative Review: Honey from the People’s Republic of China*, 69 FR 25060 (May 5, 2004), and accompanying Issues and Decision Memorandum at Comment 3; *Garlic 9<sup>th</sup> AR* Issues and Decision Memorandum at Comment 11; and *Garlic 10<sup>th</sup> AR* Issues and Decision Memorandum at Comments 8 and 9.

<sup>26</sup> See *Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfr. V. U.S.*, 44 F. Supp. 2d 229, 259 (CIT 1999) (“Commerce’s practice is to use publically available values . . .”)

<sup>27</sup> See *Apple Juice* Issues and Decision Memorandum at Comment 6.

<sup>28</sup> See *Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review*, 70 FR 34448 (June 14, 2005) and accompanying Issues and Decision Memorandum at Comment 2.

*Bicycles:*

Where design or material composition appeared to have a significant impact on price but design or material-specific data was not available in a surrogate country, we used the average actual market-economy prices from market-economy suppliers to the PRC. However, we used this data strictly as a second alternative to design- or material-specific data from India or Indonesia, where available.”<sup>29</sup>

In *Apple Juice* we stated: “To value aseptic bags for those respondents that did not purchase them from a market economy supplier, we used the average price paid by those respondents who did.”<sup>30</sup> In the *Apple Juice* Issues and Decision Memorandum at Comment 6 we stated that:

“ . . . examination at verification of the aseptic bags themselves and the market economy invoices provided by the respondents reflecting purchases of these bags from market economy suppliers confirm that these are not ordinary polyethylene plastic bags or drum liners. Therefore, we conclude that the surrogate value for aseptic bags based on the Indian import statistics does not accurately reflect the costs of aseptic bags. Accordingly, absent reliable surrogate values and consistent with our practice, for those producers which did not purchase aseptic bags from a market economy supplier, we have applied an average of the prices other respondents paid to purchase aseptic bags from a market economy supplier.”

However, we continued in Comment 6, stating “We disagree with the respondents’ argument that we should apply this ‘blending’ methodology to all factors for which there were market-economy inputs. To do as the respondents suggest would be a significant departure from the Department’s NME methodology.” In addition, we stated

“As is our practice, we valued PRC-sourced inputs using publicly available information from India, our preferred surrogate country, where such information was available. Only with respect to aseptic bags, for which we did not have reliable surrogate information, did we rely on the average of the prices other respondents paid to purchase the input from a market economy supplier.”

In both cases, the Department made it quite clear that using one or more respondents’ market-economy purchase prices as surrogate values for other respondents is contrary to its normal

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<sup>29</sup> See *Bicycles*, 61 FR 19026, 19029 - 19030.

<sup>30</sup> See *Apple Juice*, 65 FR 19873, 19875.

practice and policy, and is reserved for rare instances where no reliable publicly available data sources exist on the record.

As discussed above, in determining the most appropriate surrogate values, the Department's stated practice is "to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data."<sup>31</sup> The Department undertakes this analysis on a case-by-case basis, carefully considering the available evidence in light of the particular facts of each industry.

By their nature, import statistics have an element of general applicability to them. Therefore, as a surrogate value they may not necessarily reflect the exact experience of any one respondent. The U.S. Court of Appeals for the Federal Circuit has "noted that the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise." *Nation Ford Chem Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). This point alone, however, does not undermine the rationale discussed above. In this particular review, CFP/Three Star and SFTC have not provided any evidence to demonstrate that the Indonesian and Indian WTA data used by the Department in the *Preliminary Results* to calculate the surrogate value for erasers, lacquer and pencil cores are not reliable. Moreover, unlike in *Bicycles*, in this case there is no question that the respective Indonesian and Indian HTS categories cover the respective inputs used to produce subject merchandise. The respondents have merely pointed to Three Star's market-economy purchases of erasers and CFP's and Three Star's market-economy purchases of lacquer as support for their contentions that the WTA data are not appropriate for use in these final results. With respect to pencil cores, these same respondents point to Three Star's market-economy purchases of cores, as well as to other suggested surrogate data sources discussed in Comment 1 above. However, as we addressed in the Department's Position to Comment 1, we found the respondents' arguments with respect to the other proposed surrogate value sources unpersuasive. Mere allegations of facts, absent any record evidence for support of such claims, cannot be a basis for undermining the use of publicly available data.

Therefore, in light of the reasoning discussed above and the factual considerations of the current review, the Department continues to find that the Indonesian WTA data used to value erasers and the Indian WTA data used to value lacquer represent the best available information on the record because they are publicly available, representative of a range of prices specific to the relevant factor inputs used by the PRC respondents, and are net of taxes and import duties. Accordingly, we have made no changes to our valuation of erasers, lacquer and pencil cores for SFTC and have used the Indonesian or Indian import statistics (as discussed above) as the basis of this valuation. However, since we are treating CFP and Three Star as a single entity for purposes of this review, for the final results, we have used their combined average market-economy purchase prices for lacquer to value this input and have used Three Star's average market-economy price

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<sup>31</sup> See Policy Bulletin 04.1.

for erasers and pencil cores to value these inputs (where purchased, not self-produced) used by the combined entity in the production of subject merchandise.

**COMMENT 3: Whether the Department excluded small quantity/high value import transactions from its calculation of surrogate values**

Rongxin argues that the Department did not exclude small quantity/high value import transactions from its calculation of surrogate values for factors of production as it has done in previous administrative reviews. Rongxin states that the Department should review the import statistics used to calculate surrogate values for all FOPs and exclude low quantity/high value transactions from the surrogate value calculations.

The domestic parties argue that Rongxin has not presented a reasoned basis for determining when particular sources are aberrational, when imports from a particular source are “too low,” or prices are “too high.” In addition, the domestic parties argue that Rongxin’s argument ignores the Department’s position that it will not automatically conclude that AUVs taken from import statistics are aberrational merely because the relevant import volume is small.<sup>32</sup>

**Department’s Position:**

In calculating surrogate values for the *Preliminary Results*, the Department reviewed the import statistics used to calculate surrogate values for all FOPs and excluded low quantity/high value import transactions from its calculations where it deemed appropriate. The CIT recognizes that the Department “considers small quantity import information or data unreliable when the per-unit value is substantially different from the pencil values of the larger quantity imports of that product from other countries.”<sup>33</sup> As a general matter, for the final results, we continued to exclude low quantity/high value import transactions where they appeared to be aberrational. Rongxin did not specify which transactions it believes the Department failed to exclude. Thus the Department is unable to address specific transactions which Rongxin may consider to be low quantity/high value transactions that should be excluded from the surrogate value calculations.

**COMMENT 4: Whether the Department used the wrong HTS category to calculate a surrogate value for Rongxin’s kaolin clay**

Rongxin argues that the record evidence shows that it used the lower value kaolin clay in its production process but that the Department used the higher value kaolin clay to value Rongxin’s kaolin clay FOP.

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<sup>32</sup> See *Certain Color Television Receivers from the People’s Republic of China; Final Determination of Sales at Less Than Fair Value*, 69 FR 20594 (April 16, 2004), and the accompanying Issues and Decision Memorandum at page 30.

<sup>33</sup> See *Kaiyuan v. United States*.

The domestic parties argue that the Department used the correct surrogate value for Rongxin's kaolin clay FOP in the *Preliminary Results*, citing the Department's verification report covering Rongxin's supplier which states that its producer used "kaolin clay 'high'" to produce subject merchandise. Accordingly, the domestic parties assert that the Department should continue to apply this surrogate value to Rongxin's kaolin clay for the final results calculations as well.

### **Department's Position:**

We find kaolin clay is classified in the HTS under two separate categories, one for "Kaolin Clay Crude," and one for "Kaolin Clay (Washed, Ground, Squared/Calcined)." Rongxin has not stated elsewhere on the record of this review which category is applicable to the clay it used and did not provide adequate specifications or information with respect to the clay's physical characteristics that would allow such classification. In its case brief, Rongxin states only that its clay input is the "lower-valued clay." In its questionnaire response Rongxin reported the HTS number for the clay used to produce pencils as 68062000 which covers "exfoliated vermiculite, expanded clays, foamed slag, and other expanded mineral materials including intermixtures thereof."<sup>34</sup> This category does not cover kaolin clay. At verification Rongxin stated that the clay it used to produce subject merchandise was kaolin clay "high." However, Exhibit 8 to Rongxin's verification report includes an invoice which provides evidence that Rongxin used both "Kaolin Clay Crude," and "Kaolin Clay (Washed, Ground, Squared/Calcined)." See Rongxin's calculation memorandum for further explanation involving business proprietary information. Therefore, for the final results we are using an average surrogate value for Kaolin clay calculated from import statistics covering both "Kaolin Clay Crude," and "Kaolin Clay (Washed, Ground, Squared/Calcined)" because this best approximates Rongxin's FOP.

### **COMMENT 5: Whether the Department should continue to apply partial adverse facts available (AFA) to SFTC**

CFP/Three Star and SFTC claim that the Department should not apply partial AFA to SFTC with respect to several unreported U.S. sales for several reasons. According to these respondents, while the invoices for these sales were dated within the POR, the subject merchandise was not shipped to the United States during the POR, nor did it enter the United States during the POR. Furthermore, CFP/Three Star and SFTC argue that SFTC fully disclosed the sales and related data at verification and provided supporting documents to the Department. CFP/Three Star and SFTC argue that the Department's questionnaire instructs respondents, with respect to export price sales, to report shipments of subject merchandise to the United States and that SFTC complied with this request. CFP/Three Star and SFTC argue that if the Department continues to apply AFA with respect to these sales it should use the actual data relating to these sales since the Department placed this information on the record of the review. At the very least, CFP/Three Star and SFTC claim that any AFA value should only be applied to the CONNUMs covered by the omitted sales.

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<sup>34</sup> See Rongxin's questionnaire response dated March 24, 2005, at page 28.

The domestic parties did not comment on this issue.

### **Department's Position:**

During verification, the Department discovered several sales of subject merchandise to the United States invoiced during the POR which were not reported to the Department by SFTC, and noted that “{c}ompany officials stated that they excluded these transactions from the reported sales list because the bill of lading date was outside the POR, with the rationale that these sales could not possibly have entered the United States during the POR.”<sup>35</sup> The Department’s original questionnaire (at C-1) instructed SFTC: “Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR. . . .” Therefore, we find that SFTC complied with the Department’s specific instructions regarding the appropriate transactions to report for this POR. We agree that SFTC correctly excluded these sales from its reported sales list.

### **COMMENT 6: Whether the surrogate value for labor is correct**

CFP/Three Star and SFTC argue that the Department should abandon, or at least correct its regression-based labor rate calculation. CFP/Three Star and SFTC argue that in accordance with section 773(c)(1), (3) and (4) of the Act, the Department is required to value factors based on values of factors in an appropriate market-economy country or countries at a similar level of economic development. CFP/Three Star and SFTC argue that the Department used a regression-based wage rate based on the 2002 Yearbook of Labor Statistics published by the ILO in accordance with 19 CFR 351.408(c)(3). However, CFP/Three Star and SFTC claim that the Department’s regulation is nullified because it conflicts with the statute and that, therefore, the Department should not calculate a wage rate based on the regulation. CFP/Three Star and SFTC argue that the Department should value labor using the Indian wage rate of \$0.14 per hour.<sup>36</sup> Alternatively, CFP/Three Star and SFTC argue, the Department should revise its wage rate calculation to include the countries that were left out (by relying on the same countries each year). As a final alternative, these respondents suggest the Department should use a standard-least-squares regression analysis to calculate a surrogate wage rate.

Rongxin argues that the Department’s calculation of the surrogate labor rate is flawed for several reasons. First, it is based on incomplete data (*i.e.*, the Department did incorporate data from all

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<sup>35</sup> See Memorandum to the File through Wendy J. Frankel, Director, AD/CVD Enforcement, Office 8, from Charles Riggle, Program Manager, Erin Begnal and Cathy Feig, International Trade Compliance Analysts, AD/CVD Enforcement, Office 8: Subject: Antidumping Duty Administrative Review: Cased Pencils from the People’s Republic of China (SFTC Verification Report), dated December 14, 2005, at 6.

<sup>36</sup> CFP/Three Star and SFTC cite their February 1, 2005, surrogate value filing and exhibit 4 attached to the case brief showing the \$0.14 per hour wage rate. However, the February 1, 2005, filing is not on the record of this review; that filing was made in the 2002 - 2003 review. Furthermore, CFP/Three Star and SFTC’s case brief in this review does not include any attachments/exhibits.



countries included on the ILO website). Second, it is not based on the best available data. That is, the Department may have used data from all countries contained on the ILO website and it is not clear whether the Department used current data. Third, it is based on data from countries not at the same level of economic development as China.

Based on these assertions, Rongxin concludes that the Department's wage-rate calculation is not consistent with either the statute or the antidumping regulations. Specifically, Rongxin argues that a calculation that omits data arbitrarily (as it claims the wage-rate calculation does) is inherently flawed. Moreover, Rongxin asserts that there is no justification to use countries at a comparable level of economic development for all FOPs except labor when the statute directs the Department to value all FOPs based on values from countries at a level of economic development similar to that of the NME country subject to the proceeding.

Rongxin concludes that the Department may not have put its full calculation on the record of this review and encourages the Department to use the most contemporaneous data from only those countries at a level of economic development similar to that of the PRC.

The domestic parties argue that the the Department should continue to apply its regression-based wage rate and should not use the average Indian wage rate submitted in *Furniture*. Domestic parties assert that this wage rate was properly rejected in *Pencils 02-03* just as it was in *Furniture*, as well as in more recent determinations, and should be rejected in this review as well.<sup>37</sup> The domestic parties argue that the regression-based wage rate is mandated under 19 CFR 351.408(c)(3); thus, any departure from this methodology would be contrary to law.<sup>38</sup> Moreover, the domestic parties argue that respondents failed to substantiate their allegation that the regulations are in conflict with the statute and argue that, in the absence of such a showing, the Department should continue to rely on the regression-based wage rate calculated for the PRC in the final results, just as it did in the *Preliminary Results*.

### **Department's Position:**

In accordance with section 773(c)(1) of the Tariff Act of 1930, as amended ("the Act"), the Department determines that the GNI data from China provide the best available information to satisfy 19 CFR 351.408(c)(3), which stipulates that the Department will "calculate the wage rate to be applied in nonmarket economy proceedings each year." Specifically, it stipulates that:

For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied

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<sup>37</sup> See, e.g., *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 54361 (Sept. 14, 2005), and the accompanying Issues and Decisions Memorandum at pages 11-12

<sup>38</sup> See *Furniture* Issues and Decision Memorandum at Comment 23.

in non-market economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

The equation to establish expected NME wages begins with two variables, ILO wage data and per capita GNI. These data show the relationship between GNI per capita and wages in market economy countries. With this the Department uses the NME country's actual GNI per capita to determine the wage rate that would prevail if the NME country were a market economy country with the same level of GNI per capita. The GNI figure is a widely used, broad-based indicator of a country's macroeconomic performance, is obtained from the *World Development Indicators* of the World Bank, and constitutes the "best available information" to the Department. Furthermore, in *Furniture* we stated "we do not agree with Dorbest that we should use India's average wage rate of \$0.14/hour as a surrogate value for Chinese labor because use of such data as a surrogate for Chinese labor would be contrary to law."

**COMMENT 7: Whether to continue to treat CFP and Three Star as a single entity**

CFP/Three Star and SFTC claim that there is no basis in law or in fact to collapse CFP and Three Star. In support of its claim, CFP/Three Star and SFTC submitted, as an attachment to their rebuttal brief, argument made in their *Pencils 02-03* case brief, which is summarized below.

CFP/Three Star and SFTC, in their joint case brief, maintain that CFP and Three Star are not affiliated. They claim that in their Section A responses to the Department's questionnaire, CFP and Three Star both provided detailed information on all of their affiliated companies. CFP maintains that it made the Department aware that one of its shareholders, SLI, was administratively responsible for Three Star, but that it had no commercial or managerial interaction with SLI or any of its companies, including Three Star. CFP/Three Star and SFTC claim that CFP submitted an outline of certain 1997 events that resulted in a contract between CFP and SLI in which CFP would provide Three Star with management assistance relating to safety, sanitation, and annual inspection issues. CFP also argues that it submitted a certified statement that the company and Three Star never merged, as well as a certification from SLI that the merger never occurred, although an SLI document suggested that it should. CFP also maintains that the merger between itself and Three Star could not have been enacted because such an action would require the approval of CFP's board of directors, and that the management consulting contract ended on December 31, 2000.

CFP also claims that it certified in its submissions that it did not coordinate, share customer or supplier information, or share operating or business plans with any other exporter or producer in the PRC. It also maintains that no one on its board of directors nor any of its managers have anything to do with Three Star, according to CFP's Section A response, and that none of the managers, board members, or legal representatives of CFP or Three Star is in any way affiliated with the other company. CFP also states that there are certified statements on the record that the former general manager from Shanghai Great Wall Pencil Co. (Great Wall) (a subsidiary of CFP), Mr. Huang, stepped down from Great Wall in 1997, was nominated by CFP to SLI as a candidate for the Three Star manager position, was proposed by SLI to assume the position, and was

appointed to the position by the Three Star Employee Representative Committee, not by CFP.

Regarding the SLI 1997 merger order, which was submitted to the Department subsequent to the submission of documents evidencing other certain events in 1997, CFP argues that it submitted the legal opinion of the Zhong Lun law firm, which specializes in corporate legal work, which concluded that CFP never merged with Three Star, that the merger order does not conform to current Chinese law, and that CFP has not taken any of the steps legally required to set up a merger. CFP also contends that Three Star, in its submissions, disclosed the same information that it was not affiliated with CFP. Finally, it argues, there is a declaration from SLI on the record, stating that SLI issued the merger order without legal authority, that it was never acted upon, and that SLI rescinded the merger order retroactively to its initial issue date of January 27, 1997.

CFP/Three Star and SFTC argue that based on section 771(33) of the Act, CFP and Three Star are not affiliated, and even if they were considered affiliated, 19 CFR 351.401(f) states that collapsing two affiliated parties for dumping purposes is the exception, not the rule. They also contend that the Department has stated the same in numerous cases, including *e.g.*, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 FR 18992, 19089 (May 3, 1989) (emphasis in original):

It is the Department's general practice *not* to collapse related parties except in relatively unusual situations, where the type and degree of relationship is so significant that we find that there is a strong possibility of price manipulation. The Department has refused to collapse firms in situations where the facts suggest that such a possibility does not exist.

CFP/Three Star and SFTC maintain that the CIT in *Nihon Cement v. United States*, 17 CIT 400 (1993), also approved the Department's practice not to collapse related parties stating that:

{As} Commerce stated in *Cellular Mobile Telephones and Subassemblies from Japan*, its determination to collapse related entities is not 'based solely on the extent of their financial relationship.' Other factors relied upon by Commerce in collapsing related companies are that (1) the companies are closely intertwined; (2) transactions take place between the companies; (3) the companies have similar types of production equipment, such that it could be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and (4) the companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions.

In addition, for collapsing purposes in nonmarket economy (NME) cases, they contend, in *Hontex Enterprises, Inc., d/b/a Louisiana Packing Co. v. United States*, 342 F Supp 2d 1225 (CIT 2004),

the CIT stated that, “Commerce expand{s} the market-economy inquiry into the ‘potential for manipulation’ to include NME exporters’ export decisions, rather than whether or not the companies share production facilities.”

CFP/Three Star and SFTC maintain that there is no relationship between CFP and Three Star, if the Department considers the fact that SLI’s issuance of the merger order had no authority and was never implemented, as was stated in the declaration by the Zhong Lun law firm. They also maintain that CFP was called a “group” company since 1996 by its auditors, and that the philosophy in the PRC is “bigger is better,” but that this is not evidence that the merger order was implemented. In addition, they argue, the fact that the loans between CFP and Three Star were at market rates and have been satisfied is evidence that there is no affiliation between the companies and that the companies should not be collapsed. Also, according to them, the fact that the domestic parties found CFP’s seal on a Three Star financial statement filed with the Commercial and Administration Bureau demonstrates that CFP did not have access to Three Star’s privileged information, but only to information that was available to the public. Finally, they assert, both CFP and Three Star certified that Mr. Huang never served Great Wall and Three Star simultaneously, and that during the POR, there was no connection between Three Star’s general manager and CFP.

CFP/Three Star and SFTC conclude that the facts in this case do not support a collapsing analysis by the Department because the two companies operate as separate entities and do not have the ability to manipulate each other’s prices or production decisions. They argue that the minimal transactions between the two companies are not significant enough to warrant collapsing the two, citing *FAG Kugelfischer George Schafer KGaA v. United States*, 932 F. Supp 315 (CIT 1996), where the CIT found that even in instances where two companies were 100 percent owned by the same parent company, a collapsing determination may be inappropriate. They urge the Department to consider the facts of the current review, and acknowledge that CFP and Three Star are not affiliated and should not be collapsed for the final results.

The domestic parties argue that the Department should continue to treat CFP/Three Star as a single entity in the final results as the respondents have provided no basis for revisiting this issue.

### **Department’s Position:**

We are continuing to collapse CFP and Three Star in the final results as no evidence has been placed on the record of this review indicating that the relationship between CFP and Three Star has changed since the Department’s prior decision to collapse them. In fact they present the identical arguments in this review as they presented in the 2002 - 2003 review. Because respondents have not presented new evidence, we will continue to treat CFP/Three Star as a single entity for these final results of review.<sup>39</sup>

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<sup>39</sup> See *China First Pencil Co. v. United States*, 2006 Ct. Intl. Trade LEXIS 39, 8-9 (Ct. Int’l Trade, March 7, 2006) (“CFP v. United States”).

The Department originally determined to collapse CFP and Three Star in the 1999 - 2000 POR. This determination was upheld by the CIT.<sup>40</sup> Furthermore, in the final results of the 2001 - 2002 administrative review the Department continued to collapse CFP and Three Star because no evidence on the record demonstrated that the relationship between CFP and Three Star had changed.<sup>41</sup> That determination was also upheld by the CIT on March 7, 2006. The CIT found that

Commerce's decision to continue to collapse China First and Three Star is supported by substantial evidence and is in accordance with law. Commerce found that China First and Three Star continue to have intertwined operations and that there was an 'absence of any evidence upon the record that would justify departing from Commerce's determination in the previous review to collapse . . . .' More importantly, China First failed to meet its burden of establishing that the facts and circumstances had changed sufficiently to warrant a re-examination of Commerce's decision."<sup>42</sup>

In addition, the CIT stated "This court in *Kaiyuan Corp. v. United States*, 391 F. Supp. 2d 1317, 1321-25 (CIT 2005), conducted an exhaustive analysis of Commerce's methodology and reasoning for collapsing China First and Three Star. Plaintiffs' arguments show that none of the circumstances justifying collapsing have changed. Furthermore, under the substantial evidence standard of review applicable in administrative law cases, Commerce has properly explained its reasoning and also provided a reasonable explanation for continuing to collapse these two entities."<sup>43</sup>

The Department continued to collapse CFP and Three Star in the most recently completed review.<sup>44</sup> We stated in that review "Because there is no record evidence demonstrating that the relationship between CFP and Three Star has changed, for these preliminary results we will continue to treat them as a single entity for purposes of the antidumping analysis." See Memorandum to the file from Charles Riggle dated November 30, 2004, Administrative Review of the Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China - Affiliation and Collapsing. Subsequent to the filing of case and rebuttal briefs in that review, the Department placed on the record of that segment of the proceeding a document titled "China First Pencil Co., Inc., The Second Session of the Second Session of Shareholders Meeting Resolution Announcement," which evidenced that CFP's shareholders had formally approved the formation

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<sup>40</sup> See *Kaiyuan Corp. V. United States*, 391 F. Supp. 2d 1317, 1321-25 (CIT 2005) (*Kaiyuan v. U.S.* 2005).

<sup>41</sup> See *Pencils 01-02* Issues and Decision Memorandum at Comment 6.

<sup>42</sup> See *CFP v. United States*, 2006 Ct. Intl. Trade LEXIS 39, 8-9 (Ct. Int'l Trade, March 7, 2006).

<sup>43</sup> *Id.* at 9-10.

<sup>44</sup> See *Pencils 02-03* Issues and Decision Memorandum at Comment 1.

of a group company with Three Star. CFP failed to provide this document to the Department despite its requests. Therefore, for the final results the Department determined that facts available, with an adverse inference, was appropriate for the final results of that review. We stated “. . . we determine that CFP, contrary to its claims, implemented Order No. 005, which ordered CFP to assume a “leadership position to enact the program of capital reorganization of the two factories” and managerial control of Three Star. CFP’s implementation demonstrates that SLI possesses commercial and manufacturing control of CFP/Three Star, and that, thus, CFP and Three Star are affiliated by way of SLI. As detailed in our preliminary decision, it is appropriate to collapse these entities.”<sup>45</sup>

**COMMENT 8: Whether the Department properly accounted for wood loss in its calculation of a surrogate value for slats**

In its initial case brief Rongxin claimed that the Department’s calculation worksheet for the surrogate value for slats is not on the record and, therefore, it cannot address the calculations. Accordingly, Rongxin requested that the Department place its slat calculation worksheet on the record and allow Rongxin to comment on it. Subsequently, we reviewed the record in response to Rongxin’s brief and found that the *Preliminary Results* disclosure documents released to Rongxin by the Department inadvertently did not include a paper copy of the worksheet showing the calculation of the slat surrogate value for Rongxin. However, an electronic version of this worksheet in spreadsheet format was included on a computer diskette released to Rongxin with the disclosure documents. We alerted Rongxin to this fact whereupon Rongxin reviewed the media to locate the worksheet. Subsequently, Rongxin acknowledged that it had received this diskette that included the relevant worksheet.<sup>46</sup> Accordingly, Rongxin had a sufficient opportunity to comment upon the worksheet.

The domestic parties claim that in the *Preliminary Results* the Department failed to take proper account of wood yield loss incurred when slats are produced from lumber for use in pencil production, a result the domestic parties claim is inconsistent with the Department’s findings in prior reviews of this proceeding. According to the domestic parties, the Department has consistently recognized that slats are made from lumber and that slat production from lumber necessarily results in a significant yield loss due to slicing/sawing, or defects in the lumber such as rot and knot holes. The domestic parties assert that these findings are corroborated by statements on the record from a Chinese producer of slats.

Further, domestic parties question the Department’s application of significantly different yield losses to the three respondents subject to this review. Specifically, domestic parties argue that for CFP and Three Star, the Department erroneously applied these companies’ respective yield losses incurred during further processing of the slats as the yield loss their suppliers incurred in production of the slats. The domestic parties argue that, in fact, the Department should apply to

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<sup>45</sup> *Id.*

<sup>46</sup> See Rongxin’s letter to the Department dated May 17, 2006.

each company's reported FOPs an appropriate yield loss for each process (*i.e.*, production of slats from lumber, and further processing of the slats for pencil production). Specifically, the domestic parties argue that for the former ratio, for all respondents, the Department should rely on the lumber-to-slat yield loss reported by Laizhou, or that discussed by Wei Qu, another Chinese producer of slats. With respect to the latter ratio, the domestic parties argue that since Laizhou did not report yield loss, the Department should apply the average of the ratios reported by the other two respondents in this review.

Rongxin disputes the domestic parties' claim that it failed to report a portion of its yield loss incurred in the pencil production process. Rongxin cites the Department's verification report to support its contention that it reported all relevant costs, including its yield loss.<sup>47</sup> As further support, Rongxin cites its Section D response in which it reported gross slat consumption for its POR production of pencils.<sup>48</sup> Finally, Rongxin asserts that the surrogate value used in Rongxin's slats is more than 50 percent higher than that applied to the other respondents in this review and questions the validity of this value.

#### **Department Position:**

We find that in the *Preliminary Results*, for all respondents, in its calculation of a surrogate value for pencil slats, the Department inadvertently failed to account for wood loss occurring when lumber is cut into slats. It has been the Department's consistent practice in prior segments of this proceeding to account for wood loss that occurs when lumber is cut into slats. As we stated in the final results of the 2000 - 2001 POR: "The Department recognizes that wood loss will occur in the process of producing a slat from a piece of sawn lumber."<sup>49</sup> In addition, we stated that "Since there is no information on the record regarding wood loss that occurs in the process of producing a pencil slat from a piece of sawn lindenwood or basswood lumber, we find that the use of partial facts available is appropriate."<sup>50</sup> In this segment of the proceeding respondents have reported the relevant lumber-to-slat wood loss data for all slat producers except one. For the final results, where respondents reported the applicable wood loss data, we will account for wood loss in the slat surrogate value calculation using the reported data. For the respondent whose supplier purchased slats and did not supply the relevant wood loss data, we will apply as facts available the average of the ranged wood loss ratio calculated from yield data included in attachment A of the domestic parties' February 14, 2006, surrogate value submission.

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<sup>47</sup> See Memorandum from Charles Riggle, Program Manager, to Wendy Frankel, Office Director, China/NME Group, Office 8, dated December 14, 2005, regarding verification of Rongxin at pages 9, 10, and 11.

<sup>48</sup> See Rongxin's response at page 12 and exhibit D-4.

<sup>49</sup> See *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 43082 (July 21, 2003), and the accompanying Issues and Decision Memorandum at Comment 3.

<sup>50</sup> *Id.*

We find that Rongxin's slat value is not, as claimed by Rongxin, 50 percent higher because its supplier reported gross slat usage. Rongxin's higher slat surrogate value is due to other factors. Due to the proprietary nature of this issue, *see* the calculation memorandum for Rongxin ("Rongxin calc memo") dated June 26, 2006, for further discussion of this issue.

Moreover, we note that for Rongxin in the *Preliminary Results*, the Department inadvertently used a slat-to-pencil wood loss ratio differing from those reported by Rongxin. Furthermore, Rongxin's reported wood loss percentages for slat-to-pencil production at page 24<sup>51</sup> of its questionnaire response are inconsistent with the slat-to-pencil wood loss percentage reported at page 26.<sup>52</sup> Upon further analysis of Rongxin's reported wood loss percentages reported at page 24<sup>53</sup> for this stage of production, the Department determined that they are overstated because the calculations included the weight of cores and glue. Therefore, the Department is using Rongxin's wood loss percentage reported at page 26<sup>54</sup> to calculate Rongxin's slat surrogate value for the final results. *See* the Rongxin calc memo for further discussion of this issue.

Furthermore, at verification we reconciled purchased inputs up through the reporting of cost of goods sold in the financial statements of Rongxin's supplier. However, we did not specifically verify lumber-to-slat production wood loss.<sup>55</sup>

**COMMENT 9:           Whether the Department used the correct lumber dimensions to calculate a surrogate value for slats**

The domestic parties assert that they have provided substantial record evidence supporting the conclusion that lumber used to produce pencils is roughly three inches thick. They further argue that 4/4 basswood, which the Department used as the basis for the slat surrogate value in the preliminary results, cannot be used in pencil slat production because it is not thick enough, that lumber of a greater thickness is used and that there is no contrary record evidence. While the domestic parties claim 12/4 lumber is actually used in slat production, they also acknowledge the absence from the record of valuation data for that dimension. Notwithstanding the absence of such data, the domestic parties suggest that this value would be appropriate because the Department has consistently determined the surrogate value for slats based on the characteristics

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<sup>51</sup> *See* Rongxin's Section D questionnaire response dated March 24, 2005 (Rongxin response), at page 24.

<sup>52</sup> *See* Rongxin response at 26.

<sup>53</sup> *See* Rongxin response at 24.

<sup>54</sup> *See* Rongxin response at 26.

<sup>55</sup> *See* Rongxin's verification report, Memorandum from Charles Riggle, Program Manager, to the file, Antidumping Duty Administrative Review: Cased Pencils from the People's Republic of China, dated December 14, 2005, at pages 9, 10, and 11.



of the source lumber.<sup>56</sup> The domestic parties argue that while the Department rejected their arguments in prior reviews (which was upheld by the CIT),<sup>57</sup> the facts on the record of this review are different from prior reviews. Finally, they argue that in light of evidence on the record of this review, which differs from prior review records, the Department is not precluded from re-assessing this issue based on the new evidence. Accordingly, the domestic parties argue that the Department should use 9/4 kiln-dried basswood lumber prices from the *Hardwood Market Review* to calculate the surrogate value of pencil slats, because this is the closest to the thickness of lumber actually used in manufacturing pencil slats.

CFP/Three Star and SFTC claim that using 9/4 lumber to value slats (the closest they could get to a 12/4 value) would be inconsistent with the production process employed by all respondents that do not produce their own slats from logs. CFP/Three Star and SFTC also argue that this approach would contradict the well established and court-sanctioned methodology used by the Department since “. . . virtually the beginning of time.” CFP/Three Star and SFTC cite the following passage from the CIT’s decision regarding the final determination in the less-than-fair-value investigation of this case. CFP/Three Star and SFTC claim that this language is “. . . absolutely dispositive.”

Plaintiffs {petitioners} contested Commerce’s use of 4/4 inch thickness basswood slat values stating that Commerce should have used 12/4 (three inch) thickness instead . . . Plaintiffs assert that 4/4 thickness wood cannot be used to make a pencil slat. China First actually purchased slats measuring 1/4 inch thick and Commerce determined that 4/4 inch thick basswood slats were the closest surrogate. Remand determination at 11. The Court finds that Commerce’s use of the 4/4 inch basswood value furthers the objective of determining the most accurate and reliable surrogate.<sup>58</sup>

In addition, CFP/Three Star and SFTC claim that using 9/4 or 12/4 lumber prices from *Hardwood Market Review* to value slats would result in inaccurate surrogate values because respondents’ suppliers use inferior logs to produce slats while *Hardwood Market Review* data represents much higher quality lumber. Furthermore, they claim that the video submitted by domestic parties depicting the slat production process is unavailing and irrelevant because it has little relevance or connection to the respondents in this review.<sup>59</sup>

Rongxin argues that merely because one producer in the PRC cuts blocks to a 12/4 standard does

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<sup>56</sup> See Domestic Parties’ February 24, 2006, case brief at pages 9, 10, and 11.

<sup>57</sup> See *Writing Instrument Mfrs. v. U.S. Department of Commerce*, 21 CIT 1185, 1201, 984 F. Supp. 629 (1997) (*Writing Mfrs.*).

<sup>58</sup> *Id.*

<sup>59</sup> See CFP/Three Star and SFTC’s rebuttal brief at page 7.

not mean that all producers do the same. Rongxin argues that domestic parties fail to cite any information on the record establishing the dimension of blocks used to produce pencil slats purchased by Rongxin. Furthermore, Rongxin argues that since the Department verified that its supplier purchased slats of various dimensions, the only reasonable assumption is that the blocks used to produce the slats were of various sizes. Moreover, Rongxin argues domestic parties have provided no basis to change the methodology the Department used to value slats for the *Preliminary Results* of this review and in prior reviews. Rongxin concludes that it has relied on this methodology and to modify it in this review without justification would detrimentally affect Rongxin.

### **Department's Position:**

The Department will continue to use 4/4 lumber to value slats in the final results. We addressed this issue in the final results of the prior segment of this proceeding stating that “. . . there is no indication on the record of this review that . . . 12/4 basswood lumber is representative of that used by the respondents in this review.”<sup>60</sup> Similarly, there is no evidence on the record of this review that 9/4 basswood lumber is representative of that used by the respondents in this review. Our objective is to calculate the most accurate surrogate value possible by basing our calculation on identical or most similar materials. 4/4 lumber is closer than both 12/4 lumber and 9/4 lumber (in thickness) to the slats purchased by respondents during the POR. Our finding that 4/4 basswood lumber is the appropriate basis for the slat surrogate value calculation was upheld in *Writing Mfrs.*<sup>61</sup> as described above and, thus, based on the facts of this record, for the final results, we have continued to value slats using 4/4 basswood lumber for the final results.

### **COMMENT 10: Whether to continue to apply total Adverse Facts Available (AFA) to Guangdong Stationery & Sporting Goods Import & Export Corp.**

The domestic parties argue that because Guangdong Stationery & Sporting Goods Import & Export Corp. (GSSG) failed to report its shipment(s) of subject merchandise to the United States during the POR, “despite being requested several times to do so,” it failed to cooperate to the best of its ability in this review. Domestic parties argue that the Department properly applied AFA to GSSG in the *Preliminary Results* based on the statutory criteria, and should continue to do so in the final results of this review. Finally, domestic parties argue that the China-wide rate has been corroborated and thus provides the appropriate antidumping margin for GSSG’s exports.

CFP/Three Star and SFTC claim that GSSG made a sale of merchandise prior to the POR that may have entered the United States during the POR, but that GSSG was not required to report this sale because the invoice is dated prior to the POR. CFP/Three Star and SFTC argue that the Department normally considers the invoice date to be the date of sale and, therefore, this sale did

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<sup>60</sup> See *Pencils* 02/03 70 FR 42301 and accompanying Issues and Decision memorandum at comment 4.

<sup>61</sup> See *Writing Mfrs.*, 21 CIT 1185, 1201, 984 F. Supp. 629 (1997).

not occur during the POR and is not reportable. In addition, CFP/Three Star and SFTC claim that the invoice did not cover subject merchandise. CFP/Three Star and SFTC claim that merchandise covered by the invoice should be considered outside the scope of the order in accordance with previous scope rulings made by the Department. Moreover, CFP/Three Star and SFTC claim that application of AFA is “overly draconian” because the quantity and value of pencils covered by the invoice is “uncategorically inconsequential.” CFP/Three Star and SFTC argue that if the Department continues to apply AFA it should make an adverse inference with respect to assessment of this “non-POR” sale only, but that GSSG’s cash deposit rate should not be affected and should be maintained at its current level.

### **Department’s Position:**

The Department determines that it is appropriate to continue to apply AFA to GSSG in the final results. As stated in the *Preliminary Results*, GSSG did not submit information specifically requested in the antidumping questionnaire. On February 22, 2005, GSSG submitted a letter requesting an extension of the due date to file its Section A response. In its request GSSG stated that no extension for Sections C and D was required because it “. . . had no exports to the United States during the period December 1, 2003 to November 30, 2004, and for at least several months prior to that time.” On March 4, 2005, GSSG certified that it “had no exports to the United States during 2003 and 2004.”

We reviewed U.S. Customs and Border Protection (“CBP”) data showing that GSSG exported subject merchandise during the POR that entered the United States during the POR. The Department’s original questionnaire (at C-1) instructed GSSG: “Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR. . . .” On November 16, 2005, we issued a supplemental questionnaire that asked GSSG to “Please review GSSG’s sales, exports, and shipments made during the POR (and prior to the POR as applicable) and clarify whether GSSG had any exports, sales or entries of subject merchandise to the United States during the POR.”

On November 25, 2005, GSSG responded to our supplemental questionnaire stating that “Because the date of the invoice is prior to the POR, the transaction is not a ‘sale’ that need have been reported.” GSSG also claimed that the invoice demonstrated that the sale in question consisted on non-subject merchandise. We determined in the preliminary results that “Application of AFA to GSSG is appropriate in this review because GSSG withheld or failed to provide information specifically requested by the Department.”<sup>62</sup> Specifically, GSSG did not report the shipment during the POR. Furthermore, the invoice submitted with GSSG’s November 25, 2005, supplemental questionnaire response indicated that it was for a sale to a country other than the United States, and not related to the shipment in question. In addition, GSSG never claimed in its questionnaire or supplemental questionnaire response that the shipment in question did not cover

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<sup>62</sup>See *Preliminary Results*, 70 FR 76755, 76761-76762.

subject merchandise and did not provide any record evidence to substantiate this claim. We reviewed entry documents related to the shipment in question provided by CBP. The commercial invoice indicates a sale to the United States that included subject merchandise.

Section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title.

Because GSSG failed to provide the requested information, we determine that sections 782(d) and (e) of the Act are not relevant to our analysis. According to section 776(b) of the Act, if the Department finds that an interested party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” the Department may use information that is adverse to the interests of the party as facts otherwise available. Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” *See* Statement of Administrative Action (SAA) accompanying the URAA, H. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994) at 870. Furthermore, “an affirmative finding of bad faith on the part of the respondent is not required before the Department may make an adverse inference.” *Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997). Because GSSG did not respond to our requests for information in the form or manner requested, we find it necessary, under section 776(a)(2) of the Act, to use facts otherwise available as the basis for the final results of review for GSSG. In addition, pursuant to section 776(b) of the Act, we find that GSSG failed to cooperate by not acting to the best of its ability to comply with a request for information.

As noted above, GSSG failed to respond in the proper format or in a timely manner to the Department's questionnaire, despite repeated requests that it do so. Thus, we continue to find it appropriate to use an inference that is adverse to the interests of GSSG in selecting from among the facts otherwise available. By doing so, we ensure that GSSG will not obtain a more favorable result by failing to cooperate than had it cooperated fully in this review. Furthermore, because GSSG did not submit a section A questionnaire response, we are unable to determine whether GSSG was eligible for a separate rate during the POR. Therefore, we continue to find that GSSG does not merit a separate rate and will be subject to the PRC-wide rate.

With respect to GSSG's argument that this determination should be applied only for assessment purposes and not for purposes of future cash deposits, we find the argument unpersuasive. GSSG has provided no legal basis for this request. Therefore, this determination will be applied with respect to both the assessment and cash deposit rates resulting from this review.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for the reviewed firms in the *Federal Register*.

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Agree

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Disagree

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David M. Spooner  
Assistant Secretary  
for Import Administration

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Date